

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2008 MSPB 241

Docket No. CH-0432-08-0314-I-1

**Pamela C. Edwards,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

November 13, 2008

Pamela C. Edwards, Oklahoma City, Oklahoma, pro se.

Stephanie C. Blum, Esquire, Southfield, Michigan, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision (ID) affirming the appellant's removal. For the reasons set forth below, we DENY the appellant's petition for review because it does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#). We REOPEN this appeal on our own motion under [5 C.F.R. § 1201.118](#), however, and AFFIRM the ID as MODIFIED by this Opinion and Order, finding that the administrative judge erred in considering the appellant's claim under [5 U.S.C. § 2301\(b\)\(7\)](#).

BACKGROUND

¶2 The appellant worked as a Civil Aviation Security Specialist, also known as an Aviation Security Inspector (ASI), at the Cleveland Hopkins International Airport since December 30, 2001. Initial Appeal File (IAF), Tab 15, Subtab 4bb. In this position, the appellant was responsible for assessing and investigating the airport and air carriers to monitor compliance with applicable transportation security policies, regulations, and agreements, and for providing technical guidance on the development and modification of security plans to ensure compliance with regulatory requirements. *Id.*, Subtab 4aa. The appellant, along with a large group of ASIs, was transferred to the Transportation Security Administration (TSA) on March 23, 2003. *Id.*, Subtab 4z.

¶3 On May 28, 2003, the appellant's supervisor, Jennifer Aszalos, issued a memorandum of counseling to the appellant for unacceptable performance and failure to meet deadlines. *Id.*, Subtab 4y. For the same reasons, Ms. Aszalos gave the appellant an unsatisfactory performance rating for fiscal year 2003 on October 23, 2003. *Id.*, Subtab 4w. Ms. Aszalos placed the appellant on an Opportunity to Demonstrate Performance (ODP) plan to assist the appellant in reaching the "at" or "above" level for "meets expectations." *Id.* at 4. The completion date of the ODP was extended twice in late 2003 by Ms. Aszalos to June 30, 2004. *Id.*, Subtabs 4u at 3, 4s at 3. On August 9, 2004, Ms. Aszalos issued a notice of proposed removal for unsatisfactory performance to the appellant. *Id.*, Subtab 4k. After providing the appellant with an opportunity to respond, Assistant Federal Security Director for Law Enforcement Thomas Brandon issued the agency's final decision removing the appellant, effective November 7, 2004. *Id.* at 4; Subtabs 4g, 4e.

¶4 In late October 2004, the appellant filed an Equal Employment Opportunity (EEO) complaint, asserting that she was discriminated against on the basis of her race, color, age and sex. *Id.*, Subtab 4f at 1-2. On December 17, 2007, the agency issued its final agency decision, finding no evidence of discrimination in

the appellant's removal. *Id.*, Subtab 4a at 5, 8. The appellant then filed an appeal with the Board. IAF, Tab 1.

¶5 In the ID, the AJ first found that the Board has jurisdiction over the appeal under TSA Management Directive No. 1100.75-3, citing [49 U.S.C. § 40122](#)(g)(2). ID at 1. She then noted that the appeal is governed by the provisions of TSA's personnel management system addressing performance and conduct problems, rather than by chapter 75 of title 5. *Id.* at 4. The AJ sustained both specifications of the agency's charge of unsatisfactory performance, finding that the agency proved by preponderant evidence that the appellant failed to meet expectations in two critical elements: (1) Conducts inspections and provides technical assistance; and (2) conducts investigations and prepares reports of the findings. *Id.* at 5-8.

¶6 The AJ also found that the appellant failed to demonstrate harmful error in the application of the agency's procedures and failed to prove her affirmative defenses of discrimination by a preponderance of the evidence because she failed to identify similarly situated individuals who had performance problems but who were not removed. *Id.* at 8-11. Additionally, the AJ found that the appellant did not establish that the removal was based on a prohibited personnel practice under [5 U.S.C. § 2302](#)(b). *Id.* at 9. Based on testimonial and documentary evidence, the AJ further found that, while the appellant engaged in protected activity by filing an EEO complaint, she failed to establish that she was retaliated against because of it. *Id.* at 12-13. The AJ also held that the appellant did not prove that the agency violated [5 U.S.C. § 2301](#)(b)(7), a merit system principle, by failing to train her; in this regard, the AJ found that there was no evidence that the agency abused its discretion with respect to her training. *Id.* at 13-14. Lastly, the AJ concluded that the removal action was taken "for such cause as promotes the efficiency of the service," that the deciding official considered the appropriate *Douglas* factors, and that the penalty of removal did not exceed the tolerable limits of reasonableness. *Id.* at 16-18.

¶7 The appellant filed a petition for review (PFR) with the Board, Petition for Review File (PFRF), Tab 1, and the agency filed a response in opposition, *id.*, Tab 3.*

ANALYSIS

¶8 The appellant's PFR does not identify an error in the ID or otherwise meet the criteria for review at [5 C.F.R. § 1201.115](#); therefore, we DENY it. Nevertheless, we REOPEN this appeal to clarify the law with respect to the application of [5 U.S.C. § 2301\(b\)\(7\)](#) and 5 U.S.C. § 2302(b)(12) in appeals filed by TSA employees.

¶9 The appellant asserts, as an affirmative defense, that she was not properly trained for her position as an ASI, and thus the agency violated [5 U.S.C. § 2301\(b\)\(7\)](#). PFRF, Tab 1 at 5. She claims that following her core training in March 2002 she was assigned to various positions in various locations “completely outside of the Inspector position” and that she did not “resume” her ASI position until January 2003. *Id.* She asserts that she requested training at that time so she could “catch up with the other Inspectors.” *Id.*

¶10 Under [5 U.S.C. § 2301\(b\)\(7\)](#), “[e]mployees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.” It is a prohibited personnel practice to take a personnel action if the taking of such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles listed in § 2301 of title 5. [5 U.S.C. § 2302\(b\)\(12\)](#); *see Wright v. Federal Aviation Administration*, [40 M.S.P.R. 355](#), 357, 363 (1989).

* The ID became final on May 26, 2008; therefore the appellant was required to file a PFR on or before that date. *See* ID at 26. The submission date printed at the bottom of each page of the PFR shows that the appellant submitted her PFR by e-appeal on May 27, 2008, at 12:09:14 A.M. *See* PFRF, Tab 1. Because the PFR does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#), we have not reached the issue of whether it was timely filed, or whether there is good cause for the apparent delay.

¶11 The TSA was established by the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (ATSA), which provides the following regarding the Personnel Management System established for the TSA:

(n) PERSONNEL MANAGEMENT SYSTEM.--The personnel management system established by the Administrator of the Federal Aviation Administration under section 40122 shall apply to employees of the Transportation Security Administration, or, subject to the requirements of such section, the Under Secretary may make such modifications to the personnel management system with respect to such employees as the Under Secretary considers appropriate, such as adopting aspects of other personnel systems of the Department of Transportation.

Id. at § 101; [49 U.S.C. § 114](#)(n).

¶12 The personnel management system established by the Administrator of the Federal Aviation Administration, which is incorporated by reference into the ATSA, is codified at [49 U.S.C. § 40122](#)(g) and addresses the applicability of title 5 of the U.S. Code to the system:

(2) Applicability of title 5.--The provisions of title 5 shall not apply to the new personnel management system developed and implemented pursuant to paragraph (1), with the exception of--

- (A) section 2302(b), relating to whistleblower protection, including the provisions for investigation and enforcement as provided in chapter 12 of title 5;
- (B) sections 3308-3320, relating to veterans' preference;
- (C) chapter 71, relating to labor-management relations;
- (D) section 7204, relating to antidiscrimination;
- (E) chapter 73, relating to suitability, security, and conduct;
- (F) chapter 81, relating to compensation for work injury;
- (G) chapters 83-85, 87, and 89, relating to retirement, unemployment compensation, and insurance coverage; and
- (H) sections 1204, 1211-1218, 1221, and 7701-7703, relating to the Merit Systems Protection Board.

[49 U.S.C. § 40122](#)(g)(2).

¶13 Under the maxim of statutory interpretation *expressio unius est exclusio alterius*, where, as here, a statute enumerates certain exceptions to a general rule, it is preferable not to interpret the statute as containing other, unenumerated exceptions. *King v. Briggs*, [83 F.3d 1384](#), 1388 (Fed. Cir. 1996); *Hamlett v. Department of Justice*, [90 M.S.P.R. 674](#), ¶ 8 (2002); *Lomax v. Department of Defense*, [88 M.S.P.R. 585](#), ¶ 9 (2001); see *Andrus v. Glover Construction Co.*, [446 U.S. 608](#), 616-17 (1980). Thus, in enumerating certain exceptions to the general rule that title 5 does not apply to the personnel management system, [49 U.S.C. § 40122](#)(g)(2) dictates that any other provision of title 5 not specifically enumerated is excluded from application to the personnel management system. Significantly, [5 U.S.C. § 2301](#)(b)(7) and 5 U.S.C. § 2302(b)(12) are not listed among the exceptions cited in 49 U.S.C. § 40122(g)(2).

¶14 “[W]hen Congress intends to grant a right of action, it does so clearly and unambiguously.” *Lannom Mfg. Co., Inc. v. United States International Trade Commission*, [799 F.2d 1572](#), 1580 (Fed. Cir. 1986). “In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.” *Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n.*, [453 U.S. 1, 15](#), 101 S. Ct. 2615, 2623 (1981). Because sections 2301(b)(7) and 2302(b)(12) are clearly excluded from [49 U.S.C. § 40122](#)(g)(2), they do not apply to the TSA personnel management system. Consequently, the Board cannot address a claimed violation of these provisions in the context of an appeal filed by a TSA employee, and therefore the administrative judge erred in considering such a claim.

ORDER

¶15 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.